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2
3 IN THE UNITED STATES DISTRICT COURT
4
5 FOR THE NORTHERN DISTRICT OF CALIFORNIA

6 ANTHONY IMPERIAL,

No. 08-05644 CW

7 Plaintiff,

ORDER DENYING
DEFENDANT JAMES

8 v.

T. RAMSEY'S
MOTION TO DISMISS
(Docket No. 34)

9 CITY AND COUNTY OF SAN FRANCISCO, et
10 al.,

11 Defendants.
_____ /

12
13 Defendant James T. Ramsey, sued as Inspector Ramsey, moves to
14 dismiss Plaintiff Anthony Imperial's Second Amended Complaint (2AC)
15 for insufficient process and insufficient service of process.
16 Plaintiff opposes the motion. The motion was taken under
17 submission on the papers. Having considered all the papers
18 submitted by the parties, the Court DENIES Defendant Ramsey's
19 Motion to Dismiss. Instead, the Court allows Plaintiff fourteen
20 days from the date of this Order to serve Defendant Ramsey.

21 BACKGROUND

22 Plaintiff filed his original complaint on December 18, 2008,
23 alleging that San Francisco Police Department officers harassed him
24 in violation of 42 U.S.C. § 1983. The original complaint named as
25 Defendants the City and County of San Francisco and ten unknown
26 "Doe" individuals.

27 The City and County moved to dismiss Plaintiff's first
28 complaint for failure to state a claim. In lieu of a timely

1 opposition, Plaintiff filed an amended complaint, which the City
2 and County moved to dismiss for failure to state a claim. The
3 Court granted this motion and dismissed Plaintiff's complaint with
4 leave to amend.

5 Plaintiff filed his 2AC on July 9, 2009, naming Inspector
6 Ramsey and several Doe individuals as Defendants. Plaintiff
7 dropped his claims against the City and County. The Court's
8 records do not show that the Clerk issued a summons for Defendant
9 Ramsey.

10 DISCUSSION

11 Defendant Ramsey does not dispute that he received a copy of
12 the 2AC. He nonetheless asserts that service was insufficient
13 because the 2AC was not accompanied by a court summons. He
14 challenges the sufficiency of service under Federal Rule of Civil
15 Procedure 12(b)(5).¹

16 A federal court lacks personal jurisdiction over a defendant
17 if service of process is insufficient. Omni Capital Int'l v.
18 Rudolf Wolff & Co., 484 U.S. 97, 104 (1987). A court may dismiss
19 the action without prejudice pursuant to Rule 12(b)(5). Once a
20 defendant challenges service, a plaintiff bears "the burden of
21 establishing that service was valid under" Federal Rule of Civil
22 Procedure 4. Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir. 2004).

23
24 ¹ Defendant Ramsey also moves pursuant to Rule 12(b)(4).
25 However, a Rule 12(b)(4) motion addresses insufficient process,
26 which attacks the content of a summons. See Chilicky v. Schweiker,
27 796 F.2d 1131, 1136 (9th Cir. 1986), rev'd on other grounds, 487
28 U.S. 412 (1988) (stating that Rule 12(b)(4) was "designed to
challenge irregularities in the contents of the summons").
Defendant Ramsey does not assert such a challenge.

1 Federal Rule of Civil Procedure 4(b) requires a court summons
2 to be issued for each defendant. Under Rule 4(c)(1), a plaintiff
3 must serve each defendant with a summons and a copy of the
4 complaint. Proper service must occur within 120 days after the
5 complaint is filed. Fed. R. Civ. P. 4(m). If such service has not
6 occurred, a court "must dismiss the action without prejudice
7 against that defendant or order that service be made within a
8 specified time." Id. Although Rule 4 should be construed
9 liberally, "'neither actual notice nor simply naming the defendant
10 in the complaint will provide personal jurisdiction without
11 substantial compliance with Rule 4.'" SEC v. Ross, 504 F.3d 1130,
12 1140 (9th Cir. 2007) (quoting Benny v. Pipes, 799 F.2d 489, 492
13 (9th Cir. 1986)).

14 Plaintiff does not argue that service on Defendant Ramsey was
15 proper. Instead, he asserts that the service, via e-filing, of the
16 2AC on the City Attorney's Office, which represented the City and
17 County, constituted service on Defendant Ramsey. He appears to
18 argue that, because the City and County and Defendant Ramsey share
19 counsel, service on one is the equivalent of service on the other.
20 This is incorrect. Rule 4 requires a plaintiff to obtain a summons
21 that names each defendant and to serve it along with a copy of the
22 complaint on each defendant. Plaintiff did not satisfy either
23 requirement: no summons issued naming Defendant Ramsey and
24 Plaintiff did not serve him with any summons. Although Defendant
25 Ramsey acknowledges that he received Plaintiff's 2AC, this does not
26 satisfy the requirements of Rule 4.

27 Nonetheless, the Court DENIES Defendant Ramsey's Motion to
28

Dismiss. (Docket No. 34.) Within fourteen days of the date of this Order, Plaintiff shall (1) obtain a summons for Defendant Ramsey from the Clerk of the Court, (2) serve this summons and a copy of the 2AC on Defendant Ramsey in accordance with the requirements of Rule 4 and (3) file proof of service with the Court. If Plaintiff does so, Defendant Ramsey shall file an answer or motion to dismiss within twenty-one days of the date of service. A case management conference shall be held on July 20, 2010 at 2:00 p.m.

Failure by Plaintiff to comply with the requirements of this Order will result in the dismissal of his claims without prejudice.

IT IS SO ORDERED.

Dated: April 20, 2010



CLAUDIA WILKEN
United States District Judge